No. 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

LEROY GRAHAM, ET AL., *Petitioners*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENT.

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OPINIONS BELOW.

The opinion of the District Court granting the preliminary injunction is reported in 74 F. Supp. 663. It appears also in the record, pp. 62-6.

The opinion of the Court of Appeals has not yet been reported. It appears in the printed record, pp. 73-9.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 26, 1948. R. 80. The petition for a writ of certiorari was filed on December 7, 1948, and was granted on June 27, 1949. R. 84. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (now 28 U.S.C., Sec. 1254).

QUESTIONS PRESENTED.

1. Whether in a case brought in the United States District Court for the District of Columbia as a case arising under the Constitution and laws of the United States, venue was properly laid in the District of Columbia under the local venue statute although the federal venue statute prohibits the suit in that district.

2. Whether the class action device may be used to avoid the federal venue statute's prohibition against suing a non-inhabitant association that is suable as an entity in the district of its inhabitancy.

3. Whether a class action predicated upon the invalidity of collective bargaining agreements can be brought against individuals who the Court below found are not affected by or interested in or familiar with the agreements or their attendant circumstances and thus do not adequately represent the defendant class.

4. Whether this case involves or grows out of a "labor dispute" as defined in the Norris-LaGuardia Act; if so, whether that Act deprived the District Court of jurisdiction to issue a preliminary injunction in this case.

5. Whether the respondent has been served with process as required by Rule 4(d)(3) of the Federal Rules of Civil Procedure.

6. Whether the District Court may properly issue a preliminary injunction to change the *status quo* during the pendency of the action.

7. In the event this Court does not decide the question of whether the Norris-LaGuardia Act deprives the federal courts of jurisdiction to grant injunctive relief in this case and does not decide the question of whether respondent has been served with process, whether this Court should nevertheless order the preliminary injunction reinstated.

STATUTES AND RULES INVOLVED.

The pertinent provisions of the statutes and rules involved in this case are set out in the appendix.

STATEMENT.

A. Petitioners' Complaint and Motion for Preliminary Injunction.

This case arose upon the complaint of Leroy Graham and twenty others against the Southern Railway Company, the Seaboard Air Line Railroad Company, the Atlantic Coast Line Railroad Company, the Brotherhood of Locomotive Firemen and Enginemen, certain local lodges of said Brotherhood, and certain local officials of said local lodges. The local lodges named are situated in the District of Columbia but are not claimed to have had any participation in or connection with the acts complained of. The Brotherhood of Locomotive Firemen and Enginemen is an unincorporated association maintaining its headquarters and principal office in Cleveland, Ohio. R. 41.

The plaintiffs are all locomotive firemen on railroads in the southeastern part of the United States. They allege certain practices by the defendants, asserted to be illegal, by which they are damaged, and specifically a certain agreement between the Brotherhood and the Southeastern Carriers Conference Committee entered into February 18, 1941. R. 2-14. The petitioners sought an order declaring their rights, injunctive relief, and damages.

Concurrently with the complaint plaintiffs filed a motion for a preliminary injunction to enjoin defendants from enforcing or countenancing the agreement of February 18, 1941, or any other agreement or practice which would have a similar effect upon plaintiffs; and enjoining defendant Brotherhood from purporting to act as bargaining representative of the craft of firemen so long as it does not fairly represent plaintiffs or discriminates against them with respect to conditions of employment. R. 22.

B. Proceedings in the District Court.

Defendant Brotherhood filed motions to dismiss on several grounds including (1) improper venue, and (2) that the Brotherhood was not served with process. R. 39. All the motions to dismiss were denied. R. 45, 59-62.

On December 3, 1947, the District Court entered the order (R. 66) enjoining the Brotherhood and the railroad defendants from carrying out the agreement of February 18, 1941, or any similar agreement or understanding, and enjoining the Brotherhood from inducing the said railroads from taking any action with respect to seniority rights to assignments thereafter made which would change practices with respect to seniority rights to assignments as firemen followed by said railroads prior to the agreement of February 18, 1941, or any similar agreement.

The Court denied a stay of the injunction pending appeal but did grant a brief stay to give the Brotherhood an opportunity to apply to the Court of Appeals for a stay. R. 72.

C. Subsequent Proceedings.

On December 8, 1947, respondent filed in the Court of Appeals a motion for stay pending petition for allowance of special appeal, and pending appeal.

By stipulation of all counsel the Court treated the motion for stay as a petition for allowance of special appeal and for an order maintaining the *status quo* pending decision thereon. On December 9, 1947, it entered an order staying the injunction of the District Court pending final action on the petition for allowance of special appeal. R. 81. On January 5, 1948, the special appeal was allowed, and the stay of the preliminary injunction continued pending disposition of the appeal. R. 82.

On the appeal the Brotherhood urged reversal upon the several grounds upon which dismissal had been sought and the preliminary injunction opposed in the District Court. The Court of Appeals, however, found it unnecessary to

pass upon any of the issues other than that of improper venue. R. 74. On October 26, 1948, the Court of Appeals reversed the action of the District Court on the ground that venue was mischosen because the Brotherhood is not an inhabitant of the District of Columbia and that the action could not be sustained by treating the Brotherhood as a class because of inadequate representation of the class. R. 73, 80.

On December 7, 1948, petitioners asked for a writ of certiorari which was granted on June 27, 1949.

SUMMARY OF ARGUMENT.

I. It is not disputed that this case falls literally within the Norris-LaGuardia Act's definition of a controversy involving or growing out of a labor dispute; in such cases the federal courts are deprived of jurisdiction to issue injunctions except under conditions not even purportedly met in this case. But petitioners contend that there is an implied exception to the Act in the case of a controversy involving a violation of another later federal statute. The terms of the Act contain no such exception and its legislative history shows that such an exception was specifically not intended. The citations of petitioners in support of such an exception fail to sustain the contention. *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515, sustained an injunction but an analysis of the case, whether from the point of view of whether it fell within the terms of the Act or from the point of view of whether the conditions of the Act were complied with in issuing the injunction, shows no exception to the plain provisions of the Act. It shows that the controversy did not arise from a labor dispute as defined in the Act and that even if it did the conditions of the Act were complied with at least to the extent that such question was raised. In *Tunstall* v. *Brotherhood*, 323 U.S. 210, this Court held only that the complaint stated a cause of action; the question of what relief would be available, and the question of the effect of the Norris-LaGuardia Act on

the relief that would be available, were not raised, considered, or decided.

II. Congress has provided that in the ordinary civil action cognizable in the federal courts and not founded on diversity of citizenship a defendant may be sued only in the district of which he is an inhabitant. Since respondent maintains its headquarters and principal office in Cleveland, Ohio, it is not an inhabitant of the District of Columbia within the meaning of that statute. *Sperry Products, Inc.* v. *Association of American Railroads*, 132 F. (2d) 408 (C.A. 2, 1942). The jurisdiction of the District Court was invoked on the ground that the action arises under the Constitution and laws of the United States. R. 1, 14. When the United States District Court for the District of Columbia entertains an action cognizable by it as a federal court it is governed by federal and not local legislation. The federal venue statute therefore requires dismissal of this action.

The petitioners may not evade the plain prohibition of the federal venue statute by the device of a class suit naming inhabitants of the District of Columbia as alleged representatives of the class. The respondent is a suable entity, and a class suit is not permissible against a suable entity. Moreover, as the Court below found, the local inhabitants of the alleged class are not representative of the class for the purposes of this litigation since they are not interested in or affected by it and are unfamiliar with the merits of the controversy.

III. The respondent has not been served with process as required by the Federal Rules of Civil Procedure because service has not been had upon any of the individuals described in Rule 4(d)(3). The authorities cited by petitioners for the proposition that service upon officers of local lodges constitutes service upon the respondent have no bearing upon that proposition, and the cases that are in point hold to the contrary. Nor can service upon the

local lodge officers bring the Brotherhood into court as a class, since as we show in point II, the defendant class action device may not be used against a suable entity and the named individuals are not representative of the alleged class for the purposes of this case.

IV. The preliminary injunction would require a radical change in long-established practices and give petitioners privileges as employees they have not had before. An injunction *pendent lite* may not be used for such purpose but only to maintain the *status quo*.

V. The petitioners request interlocutory relief of this Court in the event the Court does not pass upon points I, III, and IV but remands to the Court below for consideration of those points. Such relief should not be granted since the statement upon which the need for such relief is predicated has no basis in the record or in fact. And in the absence of a finding that there is jurisdiction to grant such relief and that respondent has been brought into court, such relief would be improper.

ARGUMENT.

I. Under the Norris-LaGuardia Act, the District Court did not have Jurisdiction to Issue the Preliminary Injunction.

The Norris-LaGuardia Act (29 U.S.C., Secs. 101-15) deprived the District Court of jurisdiction to issue an injunction in this case. It apparently is not denied that this case falls within the literal provisions of that Act. The argument that that Act is inapplicable to this situation is predicated upon a compounding of untenable implications.

Section 1 of the Norris-LaGuardia Act provides that no federal court shall have jurisdiction to issue an injunction "in a case involving or growing out of a labor dispute, except in strict conformity with the provisions" of the Act. *Lauf* v. *Shinner*, 303 U.S. 323. Here there was no pretense

of satisfying the conditions of the Act, and thus the sole question is whether this case involves or grows out of a "labor dispute" within the meaning of the Act.

Section 13(c) defines a "labor dispute" to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." This case is obviously such a controversy. The petitioners complain of the terms and conditions under which they are employed; they complain that the terms and conditions whereby they are limited by percentages in jobs to which they can be assigned, or are limited by other provisions, are improper.

It is thus plain from the simple language of the Act that this controversy is a labor dispute. Since Section 1 provides that no federal court shall have jurisdiction to issue an injunction in a case "involving or growing out of a labor dispute", we must determine whether this is a case "involving" or "growing out of" such a controversy.

Section 13(a) provides that a case involves or grows out of a labor dispute when it involves "persons who are engaged in the same industry, trade, craft, or occupation * * * or who are employees of the same employer * * * whether such dispute is (1) between one or more employers * * * and one or more employees * * * or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' * * * of 'persons participating or interested' therein * * *."

It should require no demonstration that this case involves or grows out of a labor dispute, for while it is necessary to meet only one of the above tests, this case meets each of them. Plainly the petitioners and the members of the re-

spondent are engaged in the same industry and even in the same craft, the petitioners and members of the respondent are employees of the same employer, and the dispute is both between one or more employers and one or more employees and is also between one or more employees and an association of employees. Moreover, the case involves competing interests in a labor dispute of "persons participating or interested" therein, for that term is defined in Section 13(b) to include a party "if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs * * * or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

It is thus abundantly clear that this case falls within the Norris-LaGuardia Act, for however viewed, and by whatever of several tests, the answer is the same: this case involves a labor dispute within the meaning of the Act. But if any doubt could remain, it is removed by the cases. *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552; *Lauf* v. *Shinner*, 303 U.S. 323; *Fur Workers Union* v. *Fur Workers Union*, 70 App. D. C. 122, 105 F. (2d) 1, affd. 308 U.S. 522.

The *New Negro Alliance* case is particularly pertinent. It involved an effort by a Negro organization to compel a grocery chain to employ some Negro clerks, at least in stores located in colored neighborhoods. The grocery chain had a policy against employing Negro clerks. This Court, in overruling the Court below, held that such a dispute was within the Norris-LaGuardia Act. It should be remembered that the dispute in that case was not between employees on the one hand and the employer or other employees on the other hand, but between an employer on the one hand and on the other hand persons who wanted to become employees and an organization (not a labor organization) that wanted such persons to have the opportunity to become em-

ployees. But this Court held that the dispute involved terms and conditions of employment, was therefore a labor dispute, and that the District Court was therefore without jurisdiction to issue an injunction, stating (at p. 561):

> "There is no justification in the apparent purposes or the express terms of the Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race or color."

It would appear to be beyond dispute that if that case, involving discrimination against the hiring of Negroes, grew out of a controversy concerning terms and conditions of employment and was therefore a labor dispute, then certainly this case, involving alleged discrimination against Negroes after they become employees in the terms and conditions of their employment, must also arise from a labor dispute in which an injunction is prohibited except under prescribed conditions. But petitioners, relying on *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515, argue that the Norris-LaGuardia Act does not preclude injunctions to restrain violations of the Railway Labor Act, since the Railway Labor Act was amended after the enactment of the Norris-LaGuardia Act and thus its commands must be taken as *pro tanto* modifications of the earlier legislation. This argument, of course, assumes that petitioners are certain to prevail on the merits (since otherwise the Railway Labor Act can have no application), a position that respondents vigorously protest; but even making such assumption, the argument that injunctive relief is available is unsound.

It is well settled that implied repeals or amendments of statutes are to be found only in the event of utter inconsistency between the earlier and the later legislation, and then only to the extent of the irreconcilable conflict. *Wood* v. *22 Packages*, 16 Pet. 342, 363, 10 L. Ed. 987; *United States* v. *Borden*, 308 U.S. 188, 198-9; *United States* v. *24 Cans*,

148 F. (2d) 365 (C.A. 5, 1945); *McCarthy* v. *McCarthy*, 20 App. D.C. 195, 202.

No such conflict, nor indeed any conflict, can be found between the Railway Labor Act and the Norris-LaGuardia Act. There is no conflict in express terms. It should be remembered that until the decision in *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, it was not supposed that disputes regarding the actions of a craft representative in negotiating collective agreements on behalf of the craft presented justiciable questions. *Tunstall* v. *Brotherhood*, 148 F. (2d) 403. It is only by implication that limitations on the authority of a craft representative are found, and only by further implication that injunctive relief is found under any circumstances to be an available remedy for their enforcement. *Steele* v. *L. & N. R. Co.*, *supra*, at pp. 199-200. Thus the argument of implied *pro tanto* repeal in this case is based not on any express conflict in language, but seeks to find an implied repeal by virtue of impliedly available relief in appropriate cases for the enforcement of an implied provision. There is no reason whatever to imply the availability of such relief in cases where its availability is categorically denied by statute.

However, even apart from such considerations, but especially in the light of them, the *Virginian* case fails to substantiate petitioners' contentions. An injunction was issued in that case, but that case did not involve a "labor dispute" as defined in the Norris-LaGuardia Act. It involved a suit by the duly certified bargaining agent of the railroad's employees to compel the railroad to bargain with it, as required by the Railway Labor Act (45 U.S.C., Secs. 151-63). The employer in that case had refused to negotiate with the union or to talk with the bargaining representative. The union, recently certified as the bargaining agent, had requested negotiations for the purpose of entering into a contract. The case contains no suggestion that there had developed between the parties any difference of view as to what the terms or conditions of employment should be.

The employer's refusal to bargain was itself sufficient to preclude any such development. The dispute involved in that case was only the question whether the railroad was required to bargain with the union concerning terms and conditions of employment. And the employer did not dispute that the union represented the craft or class—an election and certification had settled that—so there was no dispute concerning the association or representation of employees in negotiating terms or conditions of employment.

The question in that case thus fell within none of the categories of "labor dispute" as defined in the Norris-LaGuardia Act, for it involved neither terms or conditions of employment nor the association or representation of employees in negotiating such terms or conditions. It thus has no bearing on a situation, like that involved in the instant case, where the very terms and conditions themselves are in dispute; in this case the petitioners are contending that they are entitled to more favorable terms and conditions and that some of the terms are improper. And it was one of the purposes of the Norris-LaGuardia Act to prevent the federal courts from settling terms and conditions of employment by injunction.

It should be observed also that it was not urged in the *Virginian* case, either in the briefs or in argument before this Court, that the controversy was not a "labor dispute" within the definition of the Act, nor did the Court consider such issue. S. Doc. 52, 75th Cong., 1st Sess.[1] The carrier argued only that certain terms of the injunction were prohibited; e. g., that the prohibition in Section 4(e) of an injunction against the giving of publicity to the facts of a labor controversy prohibited the enjoining of an employer from making certain statements to his employees, and that since Section 7 limited injunctions to acts specifically complained of and proven an injunction could only prohibit and a mandatory injunction was forbidden. These arguments,

[1] It is well settled that a decision of this Court is not to be regarded as precedent on an issue not raised or considered. *Ayrshire Collieries* v. *United States*, 331 U. S. 132, 137.

said this Court, were strained and unnatural constructions. And so they were. But such holding has no bearing on whether the controversy involved or grew out of a labor dispute.

Again, even if that case did involve a labor dispute within the definition of the Norris-LaGuardia Act, that Act would not have prevented the issuance of an injunction. The carrier contended that certain conditions upon which there would be jurisdiction to issue an injunction had not been met, and if we reject the "strained and unnatural" constructions upon which such contention was based then we find that the conditions were met and that therefore an injunction could issue even under the Act. However that case is viewed it is no indication that the instant controversy does not involve or grow out of a labor dispute or is not governed by the Norris-LaGuardia Act.

The *Virginian* case thus constitutes a holding only that a railroad employer can be required under the Railway Labor Act by mandatory injunction to bargain with the union in an effort to agree on what the terms or conditions of employment shall be; the case does not hold, and could not hold so long as the Norris-LaGuardia Act is law, that an injunction may be issued by a federal court to settle the terms and conditions of employment or the labor dispute itself. In this case the dispute is not as to the proper method or required method of trying to settle a labor dispute; here it is the labor dispute itself that is the controversy, and the injunction is sought to settle that dispute, and hence the *Virginian* case can have no application.

Moreover, Congress specifically did not intend to except from the Norris-LaGuardia Act injunctions against conduct in violation of other federal legislation. The Norris-LaGuardia Act itself makes no exceptions to the conduct that may not be enjoined in a labor dispute other than under the prescribed conditions. And its legislative history shows plainly that even if the conduct sought to be enjoined were in direct contravention of other Congressional enact-

ments an injunction to restrain such conduct would be subject to the provisions of the Act. A minority of the Senate Committee to which the bill was referred recommended its disapproval in part on the ground that it would protect a union from an injunction even against violating other federal statutes. S. Rpt. 163, pt. 2, 72nd Cong., 1st Sess., p. 9. To meet that objection, shared by others, an amendment was proposed on the floor of the House of Representatives to except from the provisions of the bill injunctions to restrain acts in violation of statute, but the proposed amendment was defeated. 75 Cong. Rec. 5507. In *Fur Workers Union* v. *Fur Workers Union*, 70 App. D. C. 122, 105 F. (2d) 1, affd. 308 U.S. 522, this Court affirmed without opinion a decision of the Court below that since the dispute between different groups of employees fell within the literal provisions of the Norris-LaGuardia Act, no injunction could properly issue no matter how illegal the purpose of the activity sought to be enjoined. See also *Lauf* v. *Shinner*, *supra*, and *Cole* v. *Atlanta Terminal Co.*, 15 F. Supp. 131 (D. C. N. D. Ga., 1936).

The petitioners argue also that this controversy does not fall within the Norris-LaGuardia Act because it is not the kind of controversy described in Section 2 of the Act declaring public policy. It need hardly be pointed out that the failure of the announced public policy of an Act to refer to unambiguous and explicit provisions in the Act does not remove such provisions from the Act, especially when such provisions are not in conflict with the announced public policy. Moreover, this Court has repeatedly held the Act to apply to controversies not described in the declaration of public policy. *New Negro Alliance* v. *Sanitary Grocery Co.*, *supra*, is a clear example of such a case, as is *Lauf* v. *Shinner*, 303 U.S. 323, where this Court said (at p. 330):

> "The Court of Appeals erred in holding that the declarations of policy in the Norris-LaGuardia Act and the Wisconsin Labor Code to the effect that employees are to have full freedom of association, self-organization, and designation of representatives of their own

> choosing, free from interference, restraint or coercion of their employers, puts this case outside the scope of both acts since respondent cannot accede to the petitioners' demands upon it without disregarding the policy declared by the statutes. * * * *We find nothing in the declarations of policy which narrows the definition of a labor dispute as found in the statutes. The rights of the parties and the jurisdiction of the federal courts are to be determined according to the express provisions applicable to labor disputes as so defined.*" (Emphasis supplied.)

Petitioners rely also on the circumstance that in *Tunstall* v. *Brotherhood*, 323 U.S. 210, the Norris-LaGuardia Act was not found to be pertinent. But such circumstance is necessarily without significance. The point was never raised by the parties nor mentioned by the Court. The case was defended on the ground that there were no limitations on the bargaining authority of a craft representative, and that therefore the complaint failed to state a cause of action. That contention was sustained in the lower courts. No attention was paid to the question of what remedy would be available if there were such legally enforceable limitations, and it is not until we reach the question of a remedy for the alleged wrong that the Norris-LaGuardia Act becomes applicable and prevents an injunction unless certain conditions are met. We cannot assume that the Court searched on its own initiative for arguments not raised that might be relevant to the relief that would be available, considered the Norris-LaGuardia Act, and then rejected it without mentioning it. Certainly when the point is raised it has as a minimum sufficient substance to require explanation if it is to be rejecteed. We submit that now that the point is raised it cannot be rejected.

But we need not speculate on the significance of the *Tunstall* decision on this point, for in an analogous situation this Court has expressly stated that it has no significance. *Ayreshire Collieries* v. *United States*, 331 U. S. 132, 137. In that case this Court held that the failure of one of the judges of a three-judge court to participate in the decision

rendered the judgment void, and that hence there was nothing to be appealed which this Court could consider. The Court's attention was directed to the fact that in an earlier similar situation it had exercised jurisdiction and entertained the appeal. In the earlier case the issue had not been raised or considered. This Court stated that in such circumstances the fact that the appeal was entertained is no basis for considering it as authoritative on the jurisdictional issue, since it is the firm policy of the Court not to recognize the exercise of jurisdiction as precedent where the issue was ignored.

Finally, the petitioners argue that the Norris-LaGuardia Act must be inapplicable because the circumstances of the dispute do not permit it to fulfill some of the prescribed conditions. Thus they show that they can make no showing of meeting the requirement of Section 7(e) that the officers charged with protecting the complainant's property are unable or unwilling to furnish adequate protection, since such a requirement is simply not applicable to the situation at bar.

The answer is simple. The Norris-LaGuardia Act was made law to prevent the issuance of injunctions in labor disputes except under prescribed conditions. One of those conditions is that violence exist or be threatened, against which there is inadequate protection. In the absence of such a showing, among others, an injunction is prohibited. It is somewhat astounding to find it argued that because petitioners cannot make one of the showings required by the Act before an injunction is possible that therefore the Act should not be applied.

But even if we assume that the Norris-LaGuardia Act did not intend to prohibit injunctions in all cases of labor disputes not involving violence, the petitioners' argument is unsound. Under such a view, obviously, the provisions having no applicability should not be applied. It would be just as sensible to argue that the Norris-LaGuardia Act is inapplicable to a situation existing outside city limits because Section 7 requires notice to the county and city of-

ficials. But Section 7 requires also that before an injunction can issue specific allegations of illegal conduct be proven in open court subject to cross-examination; Section 7(c) requires allegation and proof that the damage to complainant if an injunction is denied will be greater than the damage to defendant if the injunction issues; Section 8 requires proof that all efforts at negotiation have been exhausted. Not only was there no hearing at which any of these things were proven, but they were not even alleged. These provisions are clearly applicable to this situation, and until at least they are complied with the Norris-LaGuardia Act prohibits an injunction.

The necessity of literal application of the Norris-LaGuardia Act and the danger of grafting implied exceptions or implied *pro tanto* repeals are emphasized by the archaic atmosphere in which this case and an allied case have moved in the District Court. The very existence of these controversies in the courts and of preliminary injunctions that have been issued highlight as do few other situations one of the purposes of the Norris-LaGuardia Act to prevent the courts from interfering in and settling labor disputes by injunction.

The first step is seen in this case, where the District Court ordered an injunction against the carrying out of long-established contracts governing terms and conditions of employment. Then in *Palmer et al.* v. *Brotherhood et al.*, D.C., D.C., No. 662-48, the Brotherhood had served proposals on the railroads to eliminate all distinctions between promotable and non-promotable firemen, to abolish the latter category, and to make all firemen promotable. But promotability entails some risks; in the event of failure of promotion examinations three times the employee loses his fireman seniority or is dismissed from the service. An injunction was sought to prevent negotiations pursuant to such notice, and the District Court enjoined the consu amation of any contract embodying such proposal or other terms having a similar effect.[2] Thus under the theory, first an-

[2] A special appeal was allowed to the Court of Appeals, and that case is now pending in that Court, No. 9863.

nounced in this case, that the collective bargaining agent is a fiduciary of each person he represents and may not do anything that may harm any member of the craft (R. 63), we have the intrusion of the courts carried to running the day-to-day process of collective bargaining. Before negotiations were well under way, before we could learn what kind of an agreement negotiations might produce, the Court has instructed us on what agreement we may or may not make.

It is an ironic commentary that as a consequence of the courts not having been granted jurisdiction to regulate labor relations, the United States District Court for the District of Columbia is now regulating them in the railroad industry with far closer scrutiny, far greater paternalism, and more intimate detail than it would if such jurisdiction had been expressly conferred. It finds its basis in a theory that the Brotherhood is in a fiduciary relationship with every member of the class it represents. Any member of the class who feels aggrieved by any conduct or proposed conduct may come into Court and have the representative enjoined to adhere to the Court's view of strict fiduciary conduct. Since it is the fiduciary of each member of the class, it cannot properly do anything that might hurt any member. That is the view of the District Court. Had the Railway Labor Act expressly provided for judicial review of railway labor contracts, we may presume that the scope of review would have been the ordinary standard of whether there was a reasonable basis to sustain the contract. But the Railway Labor Act withholds judicial review. In its place we are now having imposed upon us by the District Court review of contracts and proposals for negotiating contracts predicated upon a fiduciary relationship for each member of the class represented. Under the standard for fiduciaries, the contract or proposal is nullified if there is any argument against it,—or the opposite extreme from what the standard would be if judicial review were expressly conferred instead of expressly denied. And the remedy

is by injunction. All this in the face of the Railway Labor Act, which denies judicial review of action thereunder, and in the face of the Norris-LaGuardia Act, which, it was believed, deprived the federal courts of jurisdiction to issue injunctions in labor disputes. This is the virtually inevitable consequence of implying exceptions or repeals to meet supposed factual situations that a particular tribunal may consider objectionable. The only safeguard against obliterating the gains of the Norris-LaGuardia Act, obtained after years of struggle and suffering and a belated recognition that only its categorical terms would be adequate, is to abide by the first rule of statutory construction, that when Congress used unequivocal language it meant what it said and that possible disagreement with the principle of the result is not a judicial function.

II. Respondent May Not be Sued in the District of Columbia in this Action, for it is Not an Inhabitant Thereof.

The federal venue statute prohibits suit in the district courts against a defendant not an inhabitant of the district. 28 U.S.C., Sec. 112 (now 28 U.S.C., Sec. 1391(b)). A supposed local venue statute of the District of Columbia prohibits suit against a defendant not resident or found in the District of Columbia. D.C. Code (1940 ed.), Sec. 11-308. In most cases, of course, the federal venue statute is more restrictive.

The petitioners argue that since this case might be brought either in the federal courts or in state courts (a point that has been assumed but never decided), the District Court for the District of Columbia may sit in this case exclusively as a local court and apply only the supposed local venue statute in determining whether this suit is prohibited in that Court. The question of the applicability of the local venue statute to this proceeding is obviously a legal question local to the District of Columbia; it is a purely local question under a local statute. This Court has repeatedly stated that on such a question the decision

of the Court of Appeals will ordinarily be accepted as final. *Fisher* v. *United States*, 328 U.S. 463; *Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72; *District of Columbia* v. *Pace*, 320 U.S. 698, 702; see *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285; cf. *United Surety Co.* v. *American Fruit Products Co.*, 238 U.S. 140, 59 L. Ed. 1238; *American Security & Trust Co.* v. *District of Columbia*, 224 U.S. 491, 56 L. Ed. 856.

But in any event, the decision below was correct in holding the local venue statute inapplicable to this proceeding. With nothing to prevent the application of the prohibition in the federal venue statute, venue was mischosen in this case.

A. Under the federal venue statute, venue was improperly laid in the District of Columbia.

The jurisdictional allegations of the complaint invoked the jurisdiction of the District Court on the ground that the action arises under the Constitution and laws of the United States. R. 1, 14.

The respondent is an unincorporated association which has its headquarters and principal place of business in Cleveland, Ohio. The only office maintained in the District of Columbia is that of its national legislative representative (who is also one of its vice-presidents). The only other person in that office is an employee who is clerk-stenographer to the national legislative representative. The Brotherhood otherwise comes to the District only sporadically, to appear before Governmental bodies. R. 40-3.

In an action not based on diversity, and with other exceptions not relevant to this case, a defendant may be sued in a district court only in the district in which it is an inhabitant. 28 U.S.C., Sec. 1391(b) (formerly 28 U.S.C., Sec. 112); *Blank* v. *Bitker*, 135 F. (2d) 962, 965 (C.A. 7, 1943); *Sperry Products, Inc.* v. *Association of American Railroads*, 132 F. (2d) 408 (C.A. 2, 1942).

In the *Sperry Products* case the Court of Appeals for the Second Circuit considered in some detail the proper venue

for a civil suit against an unincorporated association in its common name. The Association of American Railroads is an unincorporated association of many railroads engaged in activities for the common benefit of its members. The evidence showed that its principal office was in Washington, but that it maintained offices and engaged in extensive activities in New York also. Suit was attempted to be brought against it in New York. The court found that the association's activities in New York were such that it could be said to be "found" there, and that it maintained in that district a "regular and established place of business". But it held that to be an "inhabitant" of a federal judicial district within the meaning of the federal venue statute requires something more than "a regular and established place of business", that it is akin to domicile. It concluded that an unincorporated association is an "inhabitant" for federal venue purposes only of the district in which is located its principal place of business. 132 F. (2d) 408, 411. The petitioners cite nothing to the contrary; they apparently concede that if the federal venue statute is applicable this case must be dismissed or transferred.

B. Venue may not be laid in the District of Columbia under the so-called local venue statute.

The petitioners contend that in a proceeding in the United States District Court for the District of Columbia which might have been brought either in the federal courts or in the state courts, venue is properly laid in the District of Columbia although the case is prohibited either by the federal venue statute or by an alleged local District of Columbia venue statute, so long as it is not prohibited by both.[3] Under the supposed local statute, the suit is not

[3] Of course, literally there is nothing to prevent both venue statutes from applying, so that if a particular proceeding is prohibited by either venue statute it may not be maintained. But respondent need not go so far in this case; here we urge only that if the suit is cognizable by the District Court as an Article III court, only the federal venue statute applies, and if it is not so cognizable, then the local venue statute would apply.

prohibited and the District Court could entertain jurisdiction if the respondent is "found" in the District, and it is found in the District if it is doing business in the District. The local venue statute cannot be applied, for three reasons.

1. We show below that there is no local venue statute applicable to the District Court, for what was formerly such a statute has been repealed. But even if we regard the local venue statute as still subsisting, it does not permit suit against the respondent in this cause, for respondent is not engaged in business in the District of Columbia but comes here only sporadically. The two local lodges of the Brotherhood are engaged in activities in the District,[4] but it is plain that they are unincorporated associations separate and distinct from the national organization, and the activities of the local lodges cannot be attributed to the national organization. R. 43.

The Court of Appeals found it unnecessary to consider this point, because it found the federal venue statute to govern. R. 76. The petitioners say that it cannot seriously be challenged that respondent is doing business in the District of Columbia. However, the District Court was personally of the opinion that the respondent is not doing business in the District of Columbia, but held otherwise out of deference to its erroneous interpretation of the holding in *Tunstall* v. *Brotherhood*, 148 F. (2d) 403. R. 50-1. It is plain that the *Tunstall* case did not hold that respondent was doing business in the district there involved. That case had nothing whatever to do with venue. Moreover, insofar as that case sustained service of process it did so expressly as a class suit and recognized that it was highly questionable that the service could be sustained for a suit

[4] In their petition for a writ of certiorari the petitioners urged that because of this respondent was subject to suit under the Labor Management Relations Act, 1947. In our brief in opposition we pointed out that railway labor organizations are specifically excepted from the terms of the Act. The petitioners do not mention the point in their brief, and we assume it is abandoned.

against the national organization as a suable entity. 148 F. (2d) 403, 405.

2. But there is a more basic error in the view that the District Court could entertain jurisdiction under the local venue statute because it has both federal and local jurisdiction.[5]

The petitioners argue vigorously that the District Court for the District of Columbia has both federal jurisdiction as a federal court, and local jurisdiction as a local court. They infer that in any case that could be brought in either the federal courts or in state courts, the District Court can act as a federal court, at which time the federal venue statute would be applicable, or it can act as a local court, at which time the supposed local venue statute would be applicable.

Of course, no one today disputes that the United States District Court for the District of Columbia exercises both federal jurisdiction under Article III of the Constitution and jurisdiction as a local court under Article I, but it cannot exercise both simultaneously in the same cause nor select the capacity in which it chooses to act. As the Court below pointed out, venue would not lie in a federal district court when the federal venue statute prohibited the suit but under a state venue statute a non-inhabitant defendant could be sued in the state courts. R. 73; *Doyle* v. *Loring*, 107 F. (2d) 337, 340 (C.A. 6, 1939).

Illustrative of the proposition that the District Court may not act both as an Article III court and an Article I court simultaneously in the same cause of action is *King* v. *Wall and Beaver St. Corp.*, 79 App. D.C. 234, 145 F. (2d) 377 (C.A. D.C., 1944). That case was a stockholder's suit against King, to which the corporation was an indispensable

[5] The petitioners' confusion probably arises from their confusing jurisdiction and venue. Thus they criticize the Court below for discussing the applicability only of Section 11-308 of the D. C. Code (1940 ed.) and ignoring Section 11-306 in this connection. But the Court below was correct in discussing Section 11-308 as the section pertinent to this question. Section 11-306 is the jurisdictional section conferring general jurisdiction in the District Court; Section 11-308 is the venue provision prohibiting suit in certain cases even though there be jurisdiction.

party. King was an "inhabitant" of Connecticut but was temporarily in the District of Columbia and "found" there, while the corporation was a Maryland corporation neither resident nor found in the District. A special federal venue provision provides that in such a proceeding a defendant may be sued by the stockholder wherever the corporation could have sued him (28 U.S.C., Sec. 1401) and it is provided that process may be served upon the corporation wherever it could be found (28 U.S.C., Section. 1695). King was served in the District of Columbia and the corporation was served in Maryland. The Court of Appeals held that the motions to dismiss should have been granted. King could be sued in the District if only the local and not the federal venue statute applied, for he was found but was not an inhabitant of the District, while the corporation could be made a party only if the special federal and not the local venue statute applied, for it was amenable to such suit only under the special federal provision and was neither resident nor found in the District. In substance, the Court held that the District Court in a particular cause must be acting either as a federal court or as a local court, and could not act as both simultaneously. If acting as a federal court and the federal venue statute applied, the suit was prohibited against King in the District; and if sitting as a local court and the local statute applied, the corporation could not be made a party. See particularly 79 App. D. C. at pp. 236-7.

O'Donoghue v. *United States*, 289 U.S. 516, shows that the United States District Court for the District of Columbia may not select the capacity in which it chooses to act if its jurisdiction is invoked under powers it possesses that might have been conferred either under Article III or under Article I. In that case this Court held that in such cases the United States District Court for the District of Columbia exercises Article III judicial power, and that the exercise of such power cannot be affected by local legislation. See particularly p. 546. Of course, the local venue statute, even if still in effect, would be local legislation. It is clear that Article III judicial power extends to this controversy, and

therefore we may not look to local legislation to see whether venue lies in the District of Columbia in this action. Especially must this be so where jurisdiction is expressly predicated upon the action arising under the Constitution and laws of the United States. Since the federal venue statute prohibits this type of suit in a Federal District Court in a district in which the defendant is not an inhabitant, to hold that a non-inhabitant of the District of Columbia may be sued in the United States District Court for the District of Columbia under the local venue statute in a suit cognizable in Article III courts would hold in substance, under the *O'Donoghue* case, that that District Court is not an Article III court.

The *O'Donoghue* case involved the question whether the District Court for the District of Columbia was a court established under Article III, so that the limitations of that article with respect to the tenure and compensation of judges were applicable. The majority held that it was established both under Article III and under Article I. The dissenting opinion urged that it was exclusively an Article I court, established pursuant to the power of Congress to provide for the government of the District of Columbia. In denial of that Court exercising Article III power the dissenting Justices showed that every power vested in the Court could be vested in it as an Article I court, that in everything it did it could be acting as an Article I court, and therefore there was no need to look to Article III. It was apparently in an effort to overcome the force of that argument that the majority stated that when the District Court is exercising judicial power in a case cognizable under Article III it is exercising judicial power conferred under that Article, and such exercise is not affected by legislation pertaining to the court as a local court. In the words of this Court (at p. 546):

> "Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior federal courts in the District of Columbia as in the states, whether it has done so in any particular

instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere."

The question then becomes, is this cause cognizable in a court established under Article III? If so, the entertaining of this case is unaffected by local legislation. Clearly this cause is cognizable in the federal courts established under Article III, indeed, the jurisdiction of the District Court was expressly invoked on the basis of the action arising under the Constitution and laws of the United States, and just as clearly Section 11-308 of the D.C. Code (if it is law), upon which petitioners rely, is local legislation. Accordingly, we may not look to that section to determine whether venue lies in the District of Columbia, but may properly look only to the federal venue statute. Otherwise, the purely local venue statute would be permitted to override the specific prohibition in the federal venue statute against suing a non-inhabitant of the District in a federal district court.

The petitioners are concerned that the holding below will result in plaintiffs in the District of Columbia being able to sue under only one venue statute in certain causes of action, while plaintiffs elsewhere may have a choice of two venue statutes in cases that may be brought either in the federal courts or in state courts. We fail to perceive the relevance of this, so long as an adequate forum is presented and the venue statute is reasonable. And incidentally, not one of the twenty-one petitioners, plaintiffs below, who are so concerned with the rights of residents of the District of Columbia, is a resident of the District of Columbia.[4]

[4] Seven are residents of Florida, six of North Carolina, four of Virginia, two of Georgia, and one each of South Carolina and Mississippi. R. 9-13.

3. What is sometimes believed to be a local venue statute, applicable in the District of Columbia, is not law, for it was repealed by Act of Congress. The provision appears as Sec. 11-308, D.C. Code (1940 ed.). That Code is an unofficial compilation of laws of a general and permanent nature in force in or pertaining to the District of Columbia other than laws applicable in the District of Columbia by reason of being general laws of the United States. The contents of the Code are not legislation; they are simply compilations prepared under the supervision of a Congressional Committee. Act of May 29, 1928, ch. 910, 45 Stat. 1007. But an analysis of the history of Sec. 11-308 shows that it was repealed by an Act of Congress, and is included in the 1940 Code through error.

What now appears as Sec. 11-308 of the D.C. Code, 1940 ed., existed for many years as a statute governing the venue of actions in the District of Columbia. It was last enacted in 1874 as part of the Revised Statutes of the United States Relating to the District of Columbia. 18 Stat., Pt. 2, pp. 1, 91. That Act repealed all prior statutes pertaining to the District of Columbia and any part of which was included in the revision. Sec. 1296; 18 Stat., Pt. 2, p. 149. The last time a District of Columbia code or compilation of statutes was enacted by Congress was in 1901 when there was enacted The District of Columbia Code. In enacting that Code Congress was consciously making many substantive changes in the pre-existing law, but unfortunately the records do not specify what the changes were. H. Rpt. 1017, 56th Cong., 1st Sess. The 1901 Code did not contain the local venue statute nor any substitute venue statute, and Section 1636 of that Code repealed all other acts and parts of acts in force solely in the District of Columbia with exceptions having no relevance here. Under the 1901 Code, the last legislation on the subject, there is no local venue statute applicable to the District Court for the District of Columbia, and there is nothing to prevent the application of the general federal venue statute under which this suit may not

be maintained in the District of Columbia. The 1929 and 1940 Codes[7] mistakenly include the old local venue statute as a law having effect in the District of Columbia, but those Codes are simply unofficial compilation of laws believed by the compiler to be in effect. Although they may be prima facie evidence of the law, the foregoing demonstration of the mistaken inclusion of the local venue statute overcomes the force of any such presumption.

Since, then, there is no local venue statute in effect governing the United States District Court for the District of Columbia, the only venue statute governing that Court is the federal venue statute; and it is abundantly clear that under the federal venue statute venue was mistakenly chosen in the District of Columbia.

C. This case may not be maintained as a class suit.

The petitioners seek to sustain venue in the District of Columbia also on the ground that the proceeding was a class suit against the members of the Brotherhood in addition to being a suit against the Brotherhood as a suable entity, and that since the named members of the alleged class are inhabitants of the District of Columbia venue properly lies in the District of Columbia. They assert that the decision of the Court below in this case conflicts with the decision of the Fourth Circuit in *Tunstall* v. *Brotherhood*, 148 F. (2d) 403. There are three basic errors in any such contention.

1. The *Tunstall* case in the Fourth Circuit had nothing whatever to do with venue. The only discussion in that case concerning a class suit pertained to the question of whether there had been proper service of process for such a suit.

2. The Court below held that a class suit was not properly brought because the individuals named as representa-

[7] In *King* v. *Wall and Beaver St. Corp.*, 79 App. D. C. 234, 145 F. (2d) 377, it was apparently assumed that the local venue statute is still in effect. The issue was not raised or discussed.

tives of the class were not in fact representative of the class for the purposes of this litigation. The District Court made no finding that the named members of the class were properly representative, and the Court of Appeals held that such a finding could not be made because the named members were not representative for the purposes of this litigation. In the *Tunstall* case, to be sure, service of process was sustained by treating the case as a class action,[8] but in that case the local members named as representatives of the class were governed by the collective bargaining agreement under attack, were the very persons who would receive the job assignments to which the members of the plaintiff class claimed they were entitled, and were accordingly specifically found to be representative to determine the issue of the validity of that collective bargaining agreement. Here we have no such situation, and on the basis of these different facts the Court below distinguished the *Tunstall* case. It is not alleged that any of the members of the local lodges named in this case are employed on any of the railroads named as defendants in the proceeding brought in the District Court in this case, and in fact none of the employees of any of those railroads is a member of or is eligible for membership in these local lodges. R. 52. Thus the local defendants are not governed by and have no interest in the contracts under attack, and therefore are not in a position to defend the interest of those who do have an interest in those contracts.[9]

But, say the petitioners, the question whether the named members of the class sued will fairly represent the interest of the absent members does not turn on whether those named have participated as fully as the others in the acts complained of, and that the question whether the named

[8] To the extent that this was done the *Tunstall* case is in conflict with *Sperry Products, Inc.* v. *Association of American Railroads*, 132 F. (2d) 408 (C.A. 2, 1942). By no interpretation can the decision in the *Tunstall* case on this point be considered in conflict with the decision below.

[9] Moore's Federal Practice (2nd Ed., 1948) gives as one of the tests of adequate representation in a class suit "the ability of the named party to speak for the rest of the class." P. 3425.

defendants are truly representative is not determined by technical niceties. In general, we would have no quarrel with such a proposition. But the difficulty here is that the named defendants did not participate at all and have no interest in the acts complained of, and are unfamiliar with the allegedly wrongful contracts and the situation that gave rise to them.[10] To ask them to defend conduct with which they are totally unfamiliar and in which they have no interest would be the clearest abuse of the class-action procedure.

3. In this case, the respondent was sued as a suable entity and its members were sued as a class. But a class suit is improper where an unincorporated association is sued in its common name. *Sperry Products, Inc.* v. *Association of American Railroads*, 132 F. (2d) 408, 412 (C.A. 2, 1942). This is obviously sound. The reason for this is apparent when we recollect why class suits are permitted at all. Class suits are permitted when the parties are so numerous that it is impractical to bring them all into court. Indeed, the Federal Rules limit the use of class actions to cases in which such a situation in fact exists. F.R.C.P., 23(a). In such a situation a few members fairly representative of the class are selected to represent the class. But when the members of the class are an association and are made suable as such, the necessity of permitting a class suit in such situation disappears.[11] Thus the *Sperry* case properly held that when an unincorporated association is suable in its common name its members cannot be sued in a class

[10] "In an action against a defendant class the court should be particularly careful to ascertain that the defendants named by the plaintiff have 'the necessary interest or inclination to make a vigorous defense of the suit.'" Moore's Federal Practice (2nd ed.), p. 3432.

[11] "The class action was a procedural invention of equity mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals * * * from enforcing their equitable rights nor grant them immunity from their equitable wrongs." *Montgomery Ward* v. *Langer*, 168 F. (2d) 182, 197 (C. A. 8, 1948). In that case a class action procedure was sustained but the court specifically pointed out that the union was not suable in its common name in that jurisdiction. P. 186.

suit. In the instant proceeding not only is the unincorporated association suable in its common name but it was in fact sued in its common name. In such a situation, to permit a class action also against the members of the association in the very same proceeding carries the use of the class action procedure beyond its legitimate purpose and utilizes it simply as an evasion of the federal venue statute's prohibition against suing the non-inhabitant association in this district.

D. Whether this case should be dismissed or transferred to the Northern District of Ohio.

Finally, the petitioners are critical of the action of the Court of Appeals in directing a transfer of the case to the Northern District of Ohio pursuant to 28 U.S.C., Sec. 1406 (a). As that section read at the time of the decision in this case by the Court of Appeals, a district court in which a case was filed laying venue in the wrong district was directed to transfer the case to a district in which it could properly have been brought. Since the decision in this case by the Court of Appeals, that section has been amended to provide that such a case should be dismissed or, if it be in the interest of justice, should be transferred to a district in which it could have been brought. Pub. L. 72, 81st Cong., 1st Sess., Appd. May 24, 1949, Sec. 81; S. Rpt. 303, 81st Cong., 1st Sess., H. Rpt. 352, 81st Cong., 1st Sess.

Apparently at the time the Court below decided this case no practice had yet developed in the Courts of Appeals as to whether in cases where those Courts found venue mischosen they would direct a transfer or would remand to the district court for a determination of the proper district, if any, to which transfer should be made; nor has a corresponding practice yet developed under the section as amended. It is clear, however, that the action of the Court below in directing the transfer can in no way prejudice the petitioners even if there be a better practice. It is clear from the record that the Northern District of Ohio is the

proper venue for a suit in the Federal courts against the Brotherhood. There is no other district to which this case could properly be transferred. If the petitioners are correct in their apprehension that jurisdiction of the railroad defendants would not be obtained in that district, then the only alternative for the Courts of the District of Columbia would be to dismiss the action. A direction to transfer when a dismissal would have been in order cannot possibly prejudice the petitioners. Upon the transfer, opportunity will necessarily be afforded for a determination whether the railroad defendants are suable in the Northern District of Ohio, and if not whether they are indispensable parties. Neither of these issues was raised or determined in this proceeding. No possible contention of petitioners is foreclosed.

Of course, it is immaterial to respondent whether this case is dismissed or transferred to the Northern District of Ohio. We point out the above considerations for the convenience of the Court and do not take any position on whether the Court below should have ordered the case dismissed or directed the transfer.

III. Respondent has not been Served with Process in this Action.

Rule 4 (d)(3) of the Federal Rules of Civil Procedure provides that service of process upon an unincorporated association shall be made by delivering a copy to an officer, a managing or general agent, or other agent authorized to receive such process. In this action, process has not been served upon any such officer or agent of the Brotherhood. The respondent did have a vice-president, its national legislative representative, who did have an office in the District of Columbia, but no service was had upon him; he had been absent from the District for several months due to illness. The only purported service upon the Brotherhood was made by serving that officer's clerk-stenographer, who

had no authority to accept such service and who did not purport to accept such service.[12] R. 40.

The only other persons served are officers of the two local lodges in the District of Columbia. But these local lodges are separate unincorporated associations, and the local officers hold no office of any kind in the Brotherhood. R. 43; see *United Mine Workers* v. *Coronado Co.*, 259 U.S. 344, 385-9, 66 L. Ed. 975; *Dean* v. *International Longshoremen's Association*, 17 F. Supp. 748. It is specifically provided in the constitution of the Brotherhood that officers of local lodges are not agents of the Brotherhood. And it has repeatedly been held that service upon a national or international labor organization has not been effectuated in accordance with Rule 4(d)(3) when the service was made upon an officers of a local lodge. *Singleton* v. *Order of Railway Conductors*, 9 F. Supp. 417 (D.C., S.D. Ill., 1935); *Dean* v. *International Longshoremen's Assn.*, 17 F. Supp. 748 (D.C. La., 1937). And this result was specifically intended when the Rule was drafted.[13]

The District Court, however, held that service had been effectuated. R. 59. This ruling was predicated upon misconception of two cases by Courts of Appeals.

The first case relied upon was the *Tunstall* case in 148 F. (2d) 403. The District Court understood that case to hold that the local lodges of the Brotherhood "are to be deemed

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[12] The petitioners hint that this may have been enough, with the gratuitous statement that he was temporarily in charge of the Washington office. The record shows that Russell was simply clerk-stenographer to a vice-president; there is nothing whatever in the record to justify even speculation that he could have been an officer or agent of the character specified in Rule 4(d)(3). R. 40.

[13] This is shown in the hearings before the House Judiciary Committee on March 2, 1938. It was suggested by a labor attorney that Rule 4 (d)(3) should provide that unincorporated associations could not be served by serving an officer or agent of a local lodge. P. 56. In response to that suggestion a member of the Advisory Committee stated to the Judiciary Committee: "The Rule does not permit service upon officers or agents of subsidiary organizations, in cases where the named defendant is a parent or controlling organization, unless the person served is also one of the authorized officers or agents of the parent organization. I do not think that the Rule will be at all embarrassing to labor organizations. In fact, it seems to me that it affords them even more protection than does the existing practice in many states and in the federal courts." P. 85.

as agents of the Brotherhood for the purpose of service of process." R. 60. Any such view of the *Tunstall* case was not only not intended by the Court of Appeals for the Fourth Circuit but that Court had strong doubts (without ruling on the point) that the service upon the local officers would have been proper for a suit against the Brotherhood as a suable entity. As that Court said (at p. 405):

> "If this were not a class suit, but merely a suit against the unincorporated association in its common name, there would be much force to the position that the entity was not properly served."

Moreover, the facts in this case are different. In the *Tunstall* case the Court found as a fact that the local officers were representative of the class sued. In this case, not only did the District Court make no such finding, but the Court of Appeals found that no such finding could be made here. R. 78. Furthermore, as we have seen above (point II, C), a class suit cannot be permitted where, as here, the class is a suable entity. *Sperry Products, Inc.* v. *Association of American Railroads, supra.*

The other case relied upon by the District Court was the decision of the Court of Appeals for the District of Columbia in *Operative Plasterers* v. *Case*, 68 App. D. C. 43, 93 F. (2d) 56 (1937). That case involved the question of the validity of a judgment entered by a North Carolina state court. It was contended in the District of Columbia action that the North Carolina judgment was not entitled to full faith and credit in the District because there had not been proper service in the North Carolina action. In the North Carolina action service had been contested, and it had been held by the court that service had been properly made under the law of that State. The only question before the Court of Appeals for the District of Columbia was whether the method of service authorized by North Carolina law and carried out in accordance with North Carolina law complied with the requirements of due process. If it complied with the requirements of due process, then the North

Carolina state-court judgment was entitled to full faith and credit in the District of Columbia; if it did not comply with such requirements then it was not binding in the District of Columbia.

In determining that question the Court of Appeals for the District of Columbia of course applied the test of whether the North Carolina method of service was reasonably calculated to give the defendant notice of the pendency of the action. The Court of Appeals concluded that under the facts shown service on the officers of local lodges of the organization involved in that case, as authorized by North Carolina law, was reasonably calculated to give such notice, that it therefore complied with the constitutional requirements of due process, and that the judgment therefore was entitled to full faith and credit in the District of Columbia. But the Court of Appeals in the *Operative Plasterers* case did not and could not make any holding on what is sufficient process in the District of Columbia, for that question was not even remotely relevant to the issue.

The District Court in this case misconstrued the holding in the *Operative Plasterers* case, and considered it to hold that since service on the local officer would probably result in notice to the national organization, such local officer was an agent of the national organization for purposes of service of process. R. 60. This, as we have seen, was fallacious. That case has no relevance to what constitutes compliance with Rule 4(d)(3), F.R.C.P. It could have no such relevance for it involved no question of service in the District of Columbia, and of course the North Carolina state courts are not bound by Rule 4(d)(3). Indeed, the Court of Appeals has stated, more recently than its decision in the *Operative Plasterers* case, that when an unincorporated association is sued in the District of Columbia service is to be made in accordance with Rule 4(d)(3). *Busby* v. *Electric Utilities Employees Union*, 79 App. D.C. 336, 147 F. (2d) 865 (1945).

Rule 4(d)(3) requires that service of process upon an unincorporated association shall be effectuated by serving

one of several specified officers "or any other agent authorized by appointment or by law to receive service of process." It cannot be disputed that none of the specified officers was served. The petitioners' argument amounts simply to an assertion that "other agent authorized * * * by law to receive service of process" means any individual who if served would be likely to give the defendant notice of the action. No authority is cited for such a startling proposition other than the *Operative Plasterers* case, and as we have seen, that case cannot by any stretch of the imagination be considered so to hold.

Since the respondent was not served with process, the District Court was without jurisdiction and should have dismissed the action. The reversal by the Court of Appeals was proper for this independent reason also, but the Court found it unnecessary to consider this ground of reversal since it reversed on other adequate grounds.

IV. The Preliminary Injunction should not have been Granted Because it Would Alter the Status Quo.

The temporary injunction granted by the District Court, and stayed by the Court of Appeals before it became effective, would give the petitioners most of the final relief requested. It would require a radical change in long-established practices and give petitioners a different status as employees than they have had heretofore.

It is well settled that the function of a preliminary injunction is to preserve during the pendency of the litigation the situation that existed when the proceeding commenced, and that it is improper to employ it to grant any of the relief by way of change in the pre-existing situation which it is the object of the lawsuit to obtain. *United States* v. *Adler*, 107 F. (2d) 987 (C.A. 2, 1939); *Warner Bros. Pictures* v. *Gittone*, 110 F. (2d) 292 (C.A. 3, 1940).

United States v. *Adler*, *supra*, was a proceeding to compel compliance with the milk-marketing program of the Government. Apparently it was agreed for the purposes

of deciding the question on appeal that the Government was certain to prevail, and it was vigorously urged that it was essential to the effectiveness of the regulation that not only should there be compliance but that the compliance be prompt. Nevertheless, the Court held a preliminary injunction improper, and stated:

> "The purpose of an injunction *pendente lite* is to guard against a change in conditions which will hamper or prevent the granting of such relief as may be found proper after the trial of the issues. Its ordinary function is to preserve the *status quo*." (at p. 990.)

Similarly, in *Warner Bros. Pictures* v. *Gittone*, *supra*, where there was also little doubt of the final outcome of the case, the Court of Appeals reversed an order granting a preliminary injunction because "the effect of the preliminary injunction which the court granted was not to preserve the status quo but rather to alter the prior status fundamentally. Such an alteration may be directed only after final hearing."

The petitioners urge that unless the preliminary injunction is made effective they will suffer irreparable injury during the pendency of the action. It is sufficient to point out that if the preliminary injunction should go into effect the promotable firemen will suffer irreparable injury during the pendency of the action if they finally prevail. It is the petitioners who are asking the change; and unless and until it is decided that they are entitled to the change it is highly improper to grant it to them. As the Court stated in the *Warner Bros.* case:

> "Irreparable loss resulting from refusal to accord the plaintiff a new status, as distinguished from interference with rights previously enjoyed by him does not furnish the basis for interlocutory relief."

The Court below found it unnecessary to consider this point, for it reversed the order granting the preliminary injunction on other grounds. R. 74. The District Court

recognized that a preliminary injunction would alter the pre-existing relationships and rights of the parties and that such was not the usual function of a preliminary injunction. But it thought that exceptions could be made, and that this case was exceptional in that no doubtful question of law was involved in view of the decisions of this Court in *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, and of the Fourth Circuit in *Brotherhood* v. *Tunstall*, 163 F. (2) 289. R. 65. It may be observed that in *United States* v. *Adler*, *supra*, and in *Warner Bros. Pictures* v. *Gittone*, *supra*, it was assumed that the final outcome was certain to be in favor of the complainants, and yet it was held to be improper to give relief to change the *status quo* as interlocutory relief. But an analysis of the *Steele* and *Tunstall* cases shows the District Court to have been wrong in assuming that they removed any doubt from the law applicable to this case, even if we take all the allegations in this case as proven to avoid the question of how one can know what law [14] is applicable until one knows the facts.

The *Steele* case came up on a demurrer to the broad allegations of the complaint, broader than the allegations in this case. It determined nothing on the merits. It holds only that those sweeping allegations, uncontradicted and unexplained, stated a cause of action. The state courts had held that the Railway Labor Act imposed no duty on a bargaining representative not to treat any group with deliberate unfairness, no matter how gross the unfairness. This court held that to be error. The *Tunstall* case decided in the Fourth Circuit involved not only a different railroad but a quite different factual situation in that a different contract was in effect—a contract so discriminatory that some portions of it were admitted to be illegal.

The situation here is quite different. Here none of the facts have been established and the defendants have not

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[14] The petitioners assert that the *Tunstall* case declared the Southeastern Carriers Conference Agreement invalid. P. 34. That case did not even involve that agreement but involved one quite different. See *Brotherhood* v. *Tunstall*, 163 F. (2d) 289, 292. Also, the instant case involves many agreements in addition to the Southeastern Carriers Conference Agreement.

demurred to the complaint; there have been no general admissions and no hearing whatever on any of the merits of the case. We have now filed our answer in which not only do we deny many of the allegations of the complaint but allege, and expect to prove at the final hearing if the District Court may entertain this case, additional facts which throw an entirely different light on the admitted actions of the Brotherhood.

Petitioners misconceive our argument on this point. They argue that respondent must show an abuse of discretion in granting the injunction to have it set aside. We do not dispute that in circumstances where an injunction may issue we would have such burden. But we rely on an entirely different principle of law, that a preliminary injunction may not issue to change the *status quo* whatever the circumstances. The cases cited above illustrate that principle. The petitioners cite nothing to the contrary.

A further examination of the *Warner Bros.* case shows how closely analogous was the situation there involved to the alleged situation of the petitioners here. The petitioners here contend that they do not ask for restoration by preliminary injunction of what they suffered from past discrimination, but seek only to enjoin alleged future discriminations. The appellees in the *Warner Bros.* case sought to enjoin discrimination against them in the furnishing of moving pictures and urged, as do the petitioners here, that in view of certain decisions of this Court there was no doubt of the ultimate outcome of the case. It was apparently assumed in that case that there was no doubt the appellees would ultimately prevail. They too were not seeking a preliminary injunction to undo past wrongs but only to obtain in the future the treatment they alleged they were entitled to by law. But it was held that a preliminary injunction was not a matter of discretion where the complainants were seeking it to obtain a status not then being enjoyed, as distinguished from retaining a privilege. That is exactly the situation of petitioners here. They are seeking rights they

are not now enjoying under existing operating practices, and such rights may not properly be awarded as interlocutory relief.

V. Petitioners' Request for Interlocutory Relief in this Court.

Petitioners request this Court, in the event it finds the venue basis of the decision below to be erroneous and does not consider the other three grounds for affirmance but remands to the Court below to consider those other grounds, to remand with instructions to vacate the stay of the preliminary injunction pending the appeal.

This request is predicated primarily upon the assertion that Negro firemen are continually losing their employment because of allegedly discriminatory and illegal agreements. They state that "the Brotherhood will not be able to deny that additional colored firement have lost their hard-earned positions throughout 1948 and 1949 and even since this Court granted certiorari in this very case. The question presented here is whether this discrimination should be allowed to continue while the matter is pending further before the court below." P. 39.

The Brotherhood does deny the assertion of petitioners, categorically asserts that the petitioners' statement is untrue in each of its segments, and states that no Negro fireman has become unemployed during the periods stated by reason of any agreement which in this case or elsewhere has been alleged to be discriminatory.

The Government in its brief *amicus curiae* states that this Court has held unlawful the very agreement under attack in this case (pp. 2, 7) and that this Court should stop the "continued discriminatory firing of colored employees". P. 6. The agreements involved in this case are not the same as the agreement involved in the *Tunstall* cases; this is apparent from a comparison of the agreement attached to the complaint (R. 17) and the agreement involved in the *Tunstall* cases which is summarized in 163 F. (2d) 289.

And as we have stated above, there is no basis for the allegations by the Government and petitioners of "continued discriminatory firing of colored employees".[15]

The principal basis upon which the request for interlocutory relief in this Court is made, therefore, does not exist. Nor is there any merit to the other arguments advanced for this Court taking such action.

These other arguments are in substance the same as the arguments advanced in the District Court. The Brotherhood opposed the action requested in the District Court on the grounds, among others, that the federal courts are without jurisdiction to grant such relief, that the Brotherhood has not been served with process and brought into court, and that the granting of such relief to change the *status quo* is not authorized by law. It should be remembered that the request of petitioners for interlocutory relief by this Court is conditioned upon this Court not passing upon such questions but remanding them to the Court of Appeals for initial consideration by that Court. It is submitted that in the absence of a decision by this Court that the federal courts have jurisdiction to grant injunctive relief in this case and a decision that the Brotherhood has been brought into court so that it would be subject to the order requested, such an order should not be directed.

CONCLUSION.

A. We have shown that the plain words of the Norris-LaGuardia Act deprived the District Court of jurisdiction to issue the preliminary injunction. There can be no question that the controversy which is the subject of this pro-

[15] The Government also suggests (footnote, p. 8) that even if this Court finds that venue did not lie in the United States District Court for the District of Columbia it should nevertheless order that the injunction issued by that Court should be reinstated pending submission of the case to the United States District Court for the Northern District of Ohio. This amounts to a suggestion that if this Court affirms the decision below because it finds that the suit was prohibited in the District Court for the District of Columbia, it should reverse the order of the Court below and reinstate the action of the District Court taken in violation of federal statute. Merely to state the proposition is to reveal its absurdity.

ceeding literally falls within the definitions in the Act of a controversy involving or growing out of a labor dispute, in which the federal courts are deprived of jurisdiction to issue injunctions except under conditions not even purportedly met in this case. No other exceptions are contained in the Act itself. But petitioners urge that there is an implied exception of a controversy involving a violation of another later federal statute, in this case an implied provision of the other federal statute. Quite apart from the question of how we can know whether there is a violation of another federal statute until we have had a trial, the Norris-LaGuardia Act itself is categorical and has no such exception. The legislative history, of meagre assistance in some other questions pertaining to the Act, shows plainly that no such exception was intended and on the contrary was flatly rejected. And we have shown that the *Virginian* and *Tunstall* cases, the lone citations in support of such exception, fail to sustain the contention. An analysis of the *Virginian* case, whether from the point of view of whether it fell within the terms of the Act or from the point of view of whether the conditions of the Act were complied with in issuing the injunction, shows no exception to the plain provisions of the Act. In the *Tunstall* case this question was not pertinent, was not raised, and was not considered or decided. We urge that the greatest reluctance should be shown in grafting any exceptions on the Norris-LaGuardia Act, enacted after years of struggle and suffering and a recognition that only its categorical terms could offer protection. The enactment of that statute was a belated recognition of the fact, long urged and now universally accepted, that the injunctive processes of the courts are not appropriate instruments for the disposition of labor disputes.

B. In providing for the distribution of business among the federal courts, Congress took account of the convenience of defendants and provided that in the ordinary civil action cognizable in the federal courts and not founded on di-

versity of citizenship a defendant may be sued only in the district of which he is an inhabitant. Such provision is intended to serve the convenience of the defendant. It is plain that when the United States District Court for the District of Columbia entertains an action cognizable by it as a federal court it is governed by federal legislation and not by local legislation. The plain, simple language of the federal venue statute requires this suit to be dismissed as to respondent because brought in the wrong district. But various arguments requiring strained constructions and laborious theories are advanced in support of the proposition that respondent may be sued in the District of Columbia in this action. We have shown those arguments and theories to be unsound as a matter of law.

And no reason can be advanced why any effort should be made to avoid the plain impact of the federal venue statute in this case. Not only is respondent not an inhabitant of the District, but as the complaint shows not one of the twenty-one petitioners resides in the District of Columbia. None of the railroad defendants was a corporation of the District, and none of the local Brotherhood-affiliate defendants has any interest in the action. In this case, if any case, the plain provisions and obvious purpose of the federal venue statute should be applied with rigid vigor.

C. The District Court frankly stated that it regarded the defense of improper service as highly technical and one of which it disapproved and which it would seek to overrule if some plausible theory could be found to overrule it. After consideration the Court stated that its own view was that respondent had not properly been served but that it was holding to the contrary out of regard to the *Tunstall* decision in the Fourth Circuit. R. 59-60. We have shown that a crucial fact in the *Tunstall* case does not exist here (the representative character of the named defendants to represent the class), and that insofar as the *Tunstall* case permitted a class suit even with representative defendants it is squarely in conflict with the holding in the Second Cir-

cuit in the *Sperry Products* case. Those two cases are the only cases urged by counsel on either side to be squarely in point on the suability of the Brotherhood as a class (and hence whether it may be served other than as an unincorporated association). We have shown the better reasoning to be with the *Sperry Products* case, but even were it otherwise the facts here are different than in the *Tunstall* case in that representative defendants have not been named. The argument of petitioners that the Brotherhood as a suable entity was served in accordance with Rule 4(d)(3) is little short of frivolous.

D. The temporary injunction granted in the District Court would give petitioners most, and the heart, of the final relief claimed. It requires a radical change in long-established practices, and gives petitioners a status as employees they have not had heretofore. We have shown how well settled it is that a preliminary injunction may not be used to grant such relief. It should be observed that the situation of which petitioners complain is of long standing, existing on the Southern Railway for at least 39 years. Assuming that the suit was properly brought in the District of Columbia despite the federal venue statute, and assuming that the District Court had jurisdiction to grant injunctive relief despite the Norris-LaGuardia Act and had jurisdiction of respondent despite the lack of service, and assuming before trial that petitioners will prevail on the merits, we submit that until a trial on the merits establishes the right to the relief requested no such relief can properly be granted.

We believe that the trial on the merits, if one should be had in this case in the District of Columbia, will show the petitioners not to be entitled to the relief requested. But more important, we submit that prior to such trial and adjudication the relief sought as the object of the law suit should not be granted. We submit further that relief by injunction is beyond the jurisdiction of the District Court in this case. And finally, we submit that the District Court

cannot properly entertain the suit against the respondent because the respondent is not subject to suit in that Court in this cause and in any event has not properly been brought into that Court.

We have examined every contention of petitioners, and have shown each of them to be without merit. But the decision below should be affirmed if respondent is right in any of its arguments, for the respondent may not be enjoined by the District Court if the Norris-LaGuardia Act deprived the Court of jurisdiction to issue the injunction, if venue of the action does not lie in the District of Columbia, if the respondent has not been served with process and brought into that Court, or if the preliminary injunction was issued for a purpose not authorized by law. The existence of any of those situations, and all of them exist, vitiates the injunction and requires affirmance of the decision below.

Respectfully submitted,

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October 3, 1949.

APPENDIX.

28 U.S.C., Sec. 112. Federal venue statute.[16]

"* * * No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; * * *."

28 U.S.C., Sec. 1406, as amended by Pub. L. 72, 81st Cong., 1st Sess.; 63 Stat. 101. Cure or waiver of defects.[17]

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall *dismiss, or if it be in the interest of justice,* transfer such case to any district or division in which it could have been brought."

D. C. Code (1940 ed.), Sec. 11-306. General jurisdiction.

"Said court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States."

D. C. Code (1940 ed.), Sec. 11-308. Actions-Limitations Upon-Inhabitants or sojourners in District of Columbia.

"No action or suit shall be brought in the District Court of the United States for the District of Columbia by original process against any person who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided."

[16] This statute was rephrased, since the decision of the District Court in this case and before the decision by the Court of Appeals, as 28 U.S.C., Sec. 1391(b). The Court of Appeals found that no substantive change was intended as a result of the rephrasing, and the petitioners agree with that conclusion. Pet. brief, p. 42.

[17] At the time of the decision below, the italicized words were not in the statute. They were added by amendment by the Act of May 24, 1949.

Constitution: Art. I, Sec. 8 (cl. 17):

"The Congress shall have power * * *
"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) * * *."

Constitution: Art. III, Sec. 1.

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *."

Constitution: Art. III, Sec. 2.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *."

Rule 4(d)(3), Federal Rules of Civil Procedure. Summons: Service.

"* * * Service shall be made as follows:

* * * * *

"(3) Upon * * * unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

Rule 23(a), Federal Rules of Civil Procedure. Class Actions.

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce

that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Norris-LaGuardia Act (29 U.S.C., Secs. 101-15; Act of March 23, 1932, c. 90, 47 Stat. 70) (Section numbers indicated are sections in U. S. Code, Title 29).

"§ 101. Issuance of restraining orders and injunctions; limitation; public policy

"No court of the United States, as defined in sections 101-115 of this title, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in such sections."

"§ 102. Public policy in labor matters declared

"In the interpretation of sections 101-115 of this title and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in such sections, the public policy of the United States is declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor,

or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted."

"§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 101-115 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom

relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: * * *."

"§ 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

"§ 113. Definitions of terms and words used in chapter

"When used in sections 101-115 of this title, and for the purposes of such sections—

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any

association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."